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In The

Supreme Court of the United States

October Term, 1983

CHARLES H. SCHMIDT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether trial delays caused by the trial court's cancellation and postponement of hearings on defense motions should be excluded in computing the time elapsed under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174?

2. Whether a non-random method of selecting grand jurors that potentially discriminates against a cognizable subgroup is a substantial violation of the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1871, as a matter of law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet.App. A1-A12) below is reported at 711 F.2d 595. The district court's order denying petitioner's motion to dismiss the indictment based upon the Speedy Trial Act (Pet. App. C1-C15) is unreported.

JURISDICTION

The decision of the court of appeals was entered on July 22, 1983. A timely suggestion for rehearing en banc was denied by order of September 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Following indictment, Petitioner filed a number of pre-trial motions, including one attacking the grand jury selection process. The motion was filed on March 15, 1982 after Petitioner learned that the District Clerk had failed to select the grand jury from two divisions "on a substan-

tially proportionate basis" as required by the local rules thereby creating a non-random selection procedure.

As is more fully detailed in the Petition, the motion attacking the grand jury selection process and all other pending motions were fully briefed and ready for submission to the court on or before April 24, 1982. The trial court set a hearing on all pending motions for May 10, 1982 and ordered trial to commence on June 2, 1982. Without any formal communication the trial court vacated the trial and hearings settings. Finally, in late August 1982 a new trial date was set for October 18, 1982 and a date for hearing all pending motions was set for September 24, 1982.

Petitioner filed a motion to dismiss for violations of the Speedy Trial Act on September 15, 1982 some 144 days after all prior motions were fully briefed and ready for submission to the court. At the hearing on September 24, 1982, the trial court denied Petitioner's motion in connection with the selection of the grand jury. On October 8, 1982 the trial court denied Petitioner's Speedy Trial motion.

At trial, Petitioner was found guilty of one count of false swearing before a grand jury (18 U.S.C. §1623) but the jury was unable to reach a verdict on a second count under the same statute. Almost a month after trial, the trial court entered its Memorandum Opinion and Order (Pet.App.C1-C15) in connection with the denial of Petitioner's Speedy Trial motion.[1]

[1]The trial court characterized the delay as one caused by requests of Petitioner for an evidentiary hearing and as needed to deal with tag along motions in other cases (Pet.App. C-8). Petitioner, however, did not request an evidentiary hearing and there is no record indicating such. Counsel for Petitioner did request of the court's briefing clerk that Petitioner be notified if an evidentiary hearing was desired by the court. With respect to the motions in other cases, the parties in those cases filed papers virtually identical to the papers filed by Petitioner. All of the other motions were filed and ready for submission at the time of the first setting in May, 1982.

In its opinion, the court of appeals incorrectly recited that the evidentiary hearing had been "requested by defense counsel" (711 F2d 601, Pet.App. A-10) although this fact is unsupported by the record and is inaccurate. The appeals court also incorrectly concluded that Petitioner's counsel had appeared on behalf of the other parties at the hearing *(Id.)* even though a record was made of the fact that counsel for Petitioner was appearing only on behalf of Petitioner at that hearing. (Hearings Tr. Vol.5,pp.65,66).

In affirming, the court of appeals took the position that if the trial court held a hearing on a pending defense motion, the elapsed time from the date of filing until the hearing date was excluded for speedy trial purposes unless the defendant involved could demonstrate some intent to "evade the sanctions of the Act" or in some way demonstrate an "egregious case". (711 F.2d 601, 602, Pet.App. A-11) With respect to the grand jury selection issue, the court of appeals mischaracterized Petitioner's attack as being based only on violations of the local plan and not directed to the Jury Selection And Service Act. (711 F.2d 600, Pet.App.A-8)

ARGUMENT

Speedy Trial Claim.

The government first responds to the Petition herein by asserting that the claim is identical to that presented in *United States v. Horton*, 705 F.2d 1414 (5th Cir. 1983) cert. denied, No. 83-5359 (Nov. 28, 1983) and should be disposed of in a similar manner. Petitioner would be presumptuous in speculating on the reasons for the denial of certiorari in *Horton*. The government suggests, however, that the contention was that any delay in disposing of a motion for longer than 30 days is not excludable. (Gov. Res. p.5)

In the instant case, when Petitioner made his calculations of excludable time, all time consumed with briefing and preparing the motions for submission were excluded and no rigid 30 day limit was suggested. (Pet. p.4, 5) More significant, in the instant case the motions were not only fully briefed and ready for submission at an earlier date but a formal order setting them for hearing had been entered indicating that the motions were ripe for hearing.

The postponement of the hearing herein served no purpose other than to deprive Petitioner of a speedy trial. It would have been much more logical to have held an evidentiary hearing before commencing a study of the issues — yet, both the court of appeals (711 F.2d 601; Pet. App. A-12) and the government in its response (Gov. Res. p.8, n.4) make much of the trial court's stated purpose to delay the hearing to study the issues. Rather, a review of the trial settings in this case will demonstrate that motions hearings were set on all motions in relation to pending trial settings and when the trial date was postponed prior to the hearings date, the hearings were postponed to protect the later trial setting.[2]

There was no requirement for a hearing on any of Petitioner's motions. If the trial court had ultimately ruled without a hearing, it is clear than only 30 days could have been excluded after the motions were fully briefed and ready for submission. *United States v. Raineri*, 670 F.2d 702, 708 (7th Cir. 1982). Even if one assumes that a hearing was desirable and requested by a defendant, it should not follow that a trial court may then ignore the Speedy Trial Act merely by delaying such a hearing.

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[2]The first trial date was March 29, 1982 and pretrial hearings were held on March 3, 1982. The trial date was continued on motion of the government over objection of Petitioner. The June 2, 1982 trial date was vacated and at the same time, the hearings setting for May 10, 1982 was vacated.

Thus, at issue herein, is whether there should be any requirement for promptness in holding a hearing under 18 U.S.C. 3161(h)(1)(F). On this issue there is confusion among the circuits and a clear conflict has developed in the decided cases. In *United States v. Stafford*, 697 F.2d 1368 (11th Cir. 1983) the court held that the rule is different when "a pretrial motion requires a hearing" than when no hearing is required. *Id.* at 1373. When a hearing is "required", *Stafford* would hold that there is no "promptness" standard. Similarly, in the instant case and in *Horton, supra*, the 5th Circuit finds the exclusion of all time until a hearing is held on a pretrial motion to be "all but absolute." *Horton, supra* at 1416.

This standard for review is in clear conflict with that of the Second Circuit as set forth in *United States v. Cobb*, 697 F.2d 38 (2nd Cir. 1982) and the Third Circuit as indicated more recently in *United States v. Novak*, 715 F.2d 810 (3rd. Cir. 1983). Relying upon and quoting from *Cobb, supra* at 44, the court in *Novak* said at 820:

> [We] hold that under section 3161(h)(1)(F) of the Act permissable exclusions applicable to pretrial motions begin with the filing of a motion and run only "for a period of time that is 'reasonably necessary' to conclude a hearing [on the motion] or to complete the submission of the matter to the court for decision."

Contrary to the assertions of the government in its response, it is improper to assume under this standard that either the *Cobb* or *Novak* courts would have sanctioned a four month postponement of a hearing that required less than a day to conclude and had been originally scheduled after all parties had completed briefing of the motions. To hold otherwise defeats the statutory rights to a speedy trial because a trial court has only to hold a hearing on any

pretrial motion in order to exclude all time from the date of filing until the hearing. As sanctioned by the Fifth Circuit in the instant case, the trial courts may even postpone hearings to protect a postponement of a trial date from Speedy Trial scrutiny.

The clear conflict of treatment between the various circuits causes the Speedy Trial issue herein to be appropriate for a writ of certiorari. The trial court having formally set the motions for a prior hearing, thus indicating their ripeness for hearing, presents a refined issue herein and makes this case an ideal one for resolving such issue.

Grand Jury Selection.

The primary thrust of the government's response to the grand jury selection issue is to improperly characterize the original selection as one of "random" selection and to suggest that the only defect was in violating the terms of the local plan. While there was a clear violation of the local plan, Petitioner's attack on the selection process employed has always been that it resulted in a non-random selection which is contrary to the Jury Selection And Service Act, 28 U.S.C. 1861-1871.

When the district clerk drew an equal number of jurors from two different divisions that had significant differences in total population and racial composition, he insured not only a violation of the local plan requirement that jurors be drawn on a "substantially proportionate" basis but more importantly that there could not be a true random selection that would give each citizen in the pool an equal chance of being selected.

Using the voter registration lists as the basis for drawing is considered proper only so long as "any one whose name

appears on the voter lists has a chance of being selected equal to that of any other listed person. . . ." 1968 U.S. CODE CONG. & ADMIN. NEWS p. 1793. The failure to follow the local plan herein destroyed the randomness originally sought and sould be reviewed on writ of certiorari.

CONCLUSION

The questions presented herein are of a recurring and significant nature and review could greatly aid the lower courts in the application of the law with respect to such issues. A writ of certiorari should therefore be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that, on the 20th day of December, 1983, three copies of the foregoing Reply brief were served upon Respondent by placing same in the United States mail, postage prepaid, addressed to Respondent's attorneys as follows:

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